(14)

No. 96-653

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

KENNETH LEE BAKER and STEVEN ROBERT BAKER,
by his next friend, MELISSA THOMAS,
Petitioners,

v.

GENERAL MOTORS CORPORATION,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

In our opening brief, we showed that the Eighth Circuit erred in holding that 28 U.S.C. § 1738 prevents petitioners, who were not parties to a Michigan state-court suit that resulted in a consent decree between Ronald Elwell and General Motors, from calling Mr. Elwell as a witness in a federal court proceeding in Missouri. For a consent judgment approved by a single state judge to prevent everyone in the nation from obtaining such evidence in any other forum would constitute a blatant violation of the rights of nonparties and would have the startling effect of depriving state and federal civil, criminal, and administrative tribunals of relevant, nonprivileged evidence important to the administration of justice.

I. PETITIONERS, AS NONPARTIES, MAY NOT BE BOUND BY THE MICHIGAN JUDGMENT

1. As this Court recently explained, "a settlement agreement subject to court approval in a nonclass action may not impose duties or obligations on an unconsenting party or 'dispose' of his claims." *Lawyer v. Department of Justice*, 117 S. Ct. 2186, 2194 (1997) (citation omitted). GM and its amici[1] attempt to escape the force of this argument by contending that all the Eighth Circuit has done is to enforce the state-court judgment against Elwell. The Bakers, they say, are simply the unfortunate victims of the "incidental" fallout (PLAC Br. 14) of that enforcement — as if Elwell had been rendered physically unable to appear as a witness. *Cf.* GM Br. 39.

a. The fatal flaw in this argument — apart from the conspicuous *absence* of enforcement proceedings *against Elwell*, *see* n. 2, *infra* — is demonstrated by the very examples used to support it. Of course, a judgment can have *practical effects* on third parties — through, for example, the exhaustion of a company's assets by a prior judgment. *See* GM Br. 39. Similarly, if A wins a judgment that results in a transfer of property from B to A, C might be prevented as a practical matter from recovering the property from B because B no longer has title. *See* PLAC Br. 15. And of course, death or other incapacity might prevent a witness from testifying.

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[1] References to Respondent's Brief are styled "GM Br. __." References to the amicus brief of the Product Liability Advisory Council, Inc. are styled "PLAC Br. __." References to the amicus brief of the National Association of Manufacturers, et al., are styled "NAM Br. __."

But this case is not analogous to any of those examples. Rather, the proper analogy here would be a prior judgment in which A obtains a decree enjoining B from selling certain property. If B still has title, nothing in the full faith and credit obligation bars C, who was not a party or privy in the first proceeding, from successfully suing B, who still has the property, for a decree compelling B to transfer it to C.[2] In PLAC's example, the transfer of title from B to A pursuant to the judgment is an operative fact that leaves B with no property to transfer. In our example, B still has the property, just as here Elwell is available to testify.[3] In fact, GM criticizes Elwell for being present in Missouri and being willing and able to testify at trial. GM Br. 7-8 & n.4.

The Eighth Circuit held that, under § 1738, the Bakers are precluded by the state decision from obtaining the relief they seek, not because Elwell is physically incapable of providing it, but because the decree directly adjudicated the legal question of whether Elwell would be permitted to testify. To say in these circumstances that the judgment is simply being enforced against Elwell is to play a word game that not even the court below purported to play.

b. This Court's cases make the distinction plain. In *Martin v. Wilks*, 490 U.S. 755 (1989), for example, this Court applied "the general rule that a person cannot be deprived of his legal rights in a proceeding to which he is not a party." *Id.* at 759. At issue there were employment promotion decisions taken pursuant to consent decrees. The district court had held that the legality of these decrees had been determined in a prior action and that the issue of the

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[2] Of course, the question of whether B can or should be held in contempt of the initial order as a result of the transfer to C is a different one, but that problem cannot arise here because of the agreement between Elwell and GM exempting Elwell from such a sanction if he is required to testify, as he was here by being subpoenaed. Pet. App. 5a.

[3] PLAC argues: "suppose that A obtains a judgment requiring B to close his adult bookstore on nuisance grounds. C's right to purchase from B is obviously affected, but no one would say that C has therefore been bound by the judgment." PLAC Br. 15. Yet while the closure of the bookstore in this example is an operative fact that has a practical effect on C, no legal right or interest of C has been adjudicated. The proper analogy would be a private civil action by A against B for a declaratory judgment that anyone who purchases from B's adult bookstore is abetting a public nuisance — a judgment that could not be binding on C.

lawfulness of the decrees could not be revisited by the new plaintiffs. In reversing that judgment, this Court rejected the very argument advanced by GM and its amici here:

> The dissent argues . . . that respondents have not been "bound" by the decree but, rather, that they are only suffering practical adverse effects from the consent decree. . . . If [the decree] is a defense to challenges to employment practices which would otherwise violate Title VII, it is very difficult to see why respondents are not being "bound" by the decree.

Id. at 765 n.6.[4]

Similarly, in *Hansberry v. Lee*, 311 U.S. 32 (1940), this Court held that defendants in a case brought by property owners who sought to enforce a restrictive covenant — which provided that it was not effective unless signed by the owners of 95 percent of frontage in the area — could not be bound by a stipulation in a prior suit that the owners of 95 percent had signed. *Id.* at 38. Under the reasoning of GM and its amici, this Court should have treated the prior stipulation in *Lee* as binding in the subsequent litigation because "judgments affect third parties in this way all the time." PLAC Br. 15. But this Court has repeatedly rejected such an approach.[5]

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[4] Even the dissent in *Martin* is consistent with our view. The dissent contended no more than that judgments might have incidental effects on third parties "as a practical matter" and recognized that judgments could not "deprive[]" third parties "of their legal rights." 490 U.S. at 769, 770 (Stevens, J., dissenting).

[5] *See also Hanson v. Denckla*, 357 U.S. 235, 255 (1958) (judgment as to appearing defendants could not bind absent trustee and was not entitled to full faith and credit); *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 418 (1957) (state court judgment could not "extinguish any right" of absent party); *Williams v. North Carolina*, 325 U.S. 226, 230-31 (1945) (state court's finding of domicil not binding on absent party); *Blodgett v. Silberman*, 277 U.S. 1, 19 (1928) (New York surrogate court's judgment could not decide power of Connecticut (as nonparty) to impose transfer tax); *Fall v. Eastin*, 215 U.S. 1, 11-12 (1909) (upholding Nebraska court's refusal to enforce, against third-party purchaser from husband, a Washington decree in suit between husband and wife regarding title to Nebraska land); *Winona & St. P. Ry. Co. v. Plainview*, 143 U.S. 371, 390 (1892) (judgment between town and bona fide purchasers of municipal bonds was not binding, as a matter of full faith and credit, in dispute between town and railroad over same bonds).

c. The cases cited by GM and its amici are remarkably inapposite. The leading case, we are told, is *Morris v. Jones*, 329 U.S. 545 (1947). GM Br. 22, 24, 39; PLAC Br. 17; NAM Br. 14. There, this Court held that an Illinois liquidator was in "privity" with Chicago Lloyds (329 U.S. at 550), an insurance association which had defaulted in a prior Missouri action brought against it by one Morris. The liquidator was therefore bound as a party to that action. The dissent disagreed, arguing that the liquidator was a "stranger" (*id.* at 563) to the prior action, but conceded that the liquidator was "trustee" for the creditors (*id.* at 562). Thus, in the view of the majority, concepts of privity and representation bound the liquidator, and the creditors he represented, under the Full Faith and Credit Clause. This reasoning lends no support to GM's argument here, for the Bakers were not parties or privies to the Michigan proceeding.

Indeed, cases such as *Morris v. Jones*, and *Riehle v. Margolies*, 279 U.S. 218, 228 (1929) (cited at PLAC Br. 17), *undermine* GM's position. For their lesson is that private plaintiffs (such as Morris) have (at least until the commencement of bankruptcy or similar proceedings) the right to pursue common-law damages actions in the courts of their choosing, without interference from courts in foreign jurisdictions. The Bakers assert the same right here.

2. GM contends that the Bakers have no judicially cognizable liberty or property interest in obtaining Elwell's testimony that would trigger due process protections, GM Br. 35-41, and that, in any event, they did not preserve the issue below. GM Br. 34. Of course, our position on the question presented does not stand or fall on the due process issue because, as we made clear in our opening brief (at 11), the Eighth Circuit's holding is inconsistent *both* with principles of due process *and* with the statutory full faith and credit obligation embodied in § 1738.[6] Thus, even apart from issues of due process,

[6] Our argument is in no sense limited to a Missouri federal court, as GM and its amici seem to assume. It would be equally applicable if the question were to arise, for example, in the course of a deposition (authorized by the Federal Rules of Civil Procedure) in New Mexico federal court, or even in a *Michigan* federal court. The only forum in which the due process question would itself be controlling would be a Michigan *state* court, where no issue of full faith and credit would arise. Whatever ability Michigan state courts may have, as a matter of their own rules of venue, to remit Michigan plaintiffs to the Wayne County court to adjudicate in the

§ 1738 should not, as matter of statutory construction, be interpreted as running afoul of the "principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process," *Hansberry v. Lee*, 311 U.S. 32, 40 (1940), or of the "'deep-rooted historic tradition that everyone should have his own day in court'" so that "[a] judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." *Martin*, 490 U.S. at 762 (quoting 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4449, p. 417 (1981)). Indeed, GM and its amici note that this Court used the same approach in *Martin v. Wilks* in resting its decision on a construction of the Federal Rules of Civil Procedure rather than on the Fifth Amendment Due Process Clause itself. GM Br. 36 n.23; PLAC Br. 21. Nonetheless, we strongly contend that the judgment below *did* violate the Bakers' due process rights.

a. The argument that nonparties to a proceeding may not be bound by a judgment in that proceeding was made first in the district court decision under review. *See* Pet. App. 28a. In petitioners' brief before the Eighth Circuit panel, they responded to GM's full faith and credit argument by noting, *inter alia*, that they "were not parties to the proceedings resulting in the Injunction, and it is difficult to see how the Injunction could affect their rights." JA 50. Petitioners also submitted to the panel — *before* it rendered its decision — opinions of other courts rejecting application of the Michigan judgment to nonparties on the ground that "[b]edrock constitutional principles mandating procedural fairness preclude such a result." *Smith v. Superior Court*, 49 Cal. Rptr.2d 20, 27 (Ct. App. 1996), *review denied*, 1996 Cal. LEXIS 2185 (Cal. Apr. 18, 1996). *See* JA 5-6 (submissions under FRAP 28(j)); Letters of Jan. 16, 1996; April 23, 1996; and May 10, 1996. It is simply incorrect to imply that the nonparty issue was raised only in the petition for rehearing. GM Br. 34. This Court itself called for the record below before deciding to

first instance the applicability of the judgment to them (GM Br. App. D, E) derives from the personal jurisdiction of those courts over Michigan litigants and in no way supports the judgment of the Eighth Circuit.

grant certiorari on the question presented.[7]

b. As NAM acknowledges (NAM Br. 24), the "use of established adjudicatory procedures" (*Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982)) for vindicating a claim, securing relief, or redressing a grievance may give rise to a constitutionally protected interest. The Bakers subpoenaed Mr. Elwell's testimony pursuant to Fed. R. Civ. P. 45, and that subpoena was properly served on Mr. Elwell while he was within the jurisdiction of the federal district court in Missouri. Pursuant to the Federal Rules of Evidence and Federal Rules of Civil Procedure, the Bakers then sought to introduce his testimony in court.[8]

The right to invoke established adjudicatory procedures for obtaining evidence itself constitutes an entitlement or claim — whether it stands apart from other litigation or is embedded in an underlying lawsuit against a tortfeasor for money damages. If Elwell had refused to testify after being validly served with a subpoena, the Bakers could have sought contempt sanctions under Fed. R. Civ. P. 45(e) and 28 U.S.C. § 1826. *See Logan*, 455 U.S. at 430-31 ("The hallmark of property" is "an individual entitlement" "which cannot be removed except 'for cause,'" so that "[a] claimant has more than an abstract desire or interest in redressing his grievance").

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[7] Further, since the full faith and credit issue was indisputably argued before, and decided by, the Eighth Circuit, the due process dimension of that issue is cognizable under the "enlargement" doctrine. *Dewey v. Des Moines*, 173 U.S. 193, 198 (1899). In any event, in reviewing the judgment of a lower federal court, there is no jurisdictional barrier to the consideration of issues not fully litigated below. *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980).

[8] NAM contends that the Bakers have no cognizable property interest under Missouri law. NAM Br. 22. But it is *federal*, not *state*, law that creates the entitlement at issue here. In any event, the Missouri Attorney General — a more authoritative source than NAM on issues of Missouri law — takes the view that the Bakers have a right of access to relevant, nonprivileged evidence and that application of the Michigan judgment would violate due process. Mo. AG Br. 8-10. NAM's cases are inapposite; none remotely calls into question the right of litigants to invoke established adjudicatory procedures for obtaining evidence. *E.g., Martin v. Schmalz*, 713 S.W.2d 22, 23 (Mo. App. 1986) (statute limiting access to arrest records applies retroactively); *Brown v. Hamid*, 856 S.W. 2d 51, 56-57 (Mo. 1993) (finding no need to recognize tort of intentional spoliation of evidence where there was no proof of intentional wrongdoing, although noting Missouri's leading "role in developing the spoliation doctrine in evidence law").

We certainly do not contend (as claimed in NAM Br. 24-25) that civil plaintiffs have a constitutional right to particular pieces of evidence or to particular evidentiary rules. Rather, we submit that "established adjudicatory procedures" for vindicating a claim to obtain relevant and nonprivileged evidence create cognizable property rights as a matter of federal law. *Logan*, 455 U.S. at 429. The suggestion by GM and its amici that this proposition would portend a radical change in federal judicial procedure has the matter precisely backwards. Since at least 1915, this Court has recognized the federal right of litigants in federal court to invoke judicial procedures for securing access to "evidence material to [their] case." *Ex parte Uppercu*, 239 U.S. 435, 439 (1915); *see also id.* at 439-40 ("The general principle is that [a party seeking discovery] has a right to have [the materials he is seeking] produced. . . . The necessities of litigation and the requirements of justice found a new right of a wholly different kind."). To accept GM's view that the Bakers had *no* legally cognizable entitlement to press their claim to obtain Elwell's testimony would mean that the district court would have been free, consistent with due process, simply to forbid them from seeking a subpoena or that the court could have decided whether to admit Elwell's testimony by flipping a coin. "Certainly," in the words of the *Logan* Court, 455 U.S. at 431, "it would require a remarkable reading of a 'broad and majestic term[],' to conclude that a horse trainer's license is a protected property interest under the Fourteenth Amendment," while the right of a child to use legally established adjudicatory procedures to adduce probative evidence in a tort suit for the death of his mother is not. Even the Eighth Circuit assumed that the judgment implicated "the discovery rights of litigants," although it mistakenly believed that those rights could be overridden. Pet. App. 15a. The district court, in permitting Elwell to testify, similarly recognized that the judgment purported to "define[] the rights of innocent third parties who have a keen interest in the information which Elwell holds." Pet. App. 28a.[9]

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[9] Even cases cited by GM and its amici recognize enforceable rights of access to evidence, in contexts less compelling than the instant case. *E.g., Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1428 (10th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991); *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775,

Our argument does not mean, of course, that generally applicable adjudicatory procedures used to determine the admission of evidence cannot be changed, or that the use of evidence cannot be restricted for a wide variety of reasons. *See Logan*, 455 U.S. at 432-33. What it does mean is that actions depriving an individual of the entitlement are subject to procedural due process limitations — that the entitlement cannot be taken away arbitrarily (as in *Logan)* or (as here) because of an adjudication in another forum in which the person to be deprived did not participate.[10]

c. In any event, GM does not dispute that the right to adduce testimony pursuant to a court's compulsory process — whether or not *itself* deemed a "claim" under *Logan* — is at least *ancillary to* a protected property interest: a cause of action for damages. Instead, GM and its amici defend the judgment below on the ground that Elwell is just another expert witness whose testimony is of minimal value to the Bakers, at best.

The record reveals, however, that Elwell was designated as a fact witness (Pet. App. 22a) and testified as such at trial. In particular, he testified regarding a 1973 document known as the "Ivey" memorandum, Tr. 407-15; Plaintiffs' Exhibit 621; Pet. App. 6a, which is a value analysis prepared by Edward Ivey, an Advance Design employee, and allegedly circulated among selected top GM

789 (1st Cir. 1988). The existence of such rights cannot be denied by noting that private parties are sometimes unable to obtain evidence for practical reasons of geography, scheduling, or financial constraints. GM Br. 37. We deal here with the application of § 1738 by the judicial branch of government to deny the Bakers access to established adjudicatory procedures for obtaining evidence.

[10] It is true that the *result* in *Martin v. Wilks* was substantially modified by Congress. PLAC Br. 21 n.16. But whatever the extent of Congress' power to affect rights through generally applicable legislation, *see Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441, 445-46 (1915), such power does not justify the denial of a litigant's procedural due process rights through a judicial proceeding in which he or she is not a party. *Logan*, 455 U.S. at 432-33; *cf. Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2238, 2252 (1997). Further, in responding to *Martin*, Congress provided that a nonparty could be bound *only* in a very limited context — in which there had been adequate prior notice and opportunity to present objections to the court. 42 U.S.C. § 2000e-2(n)(1)(B). Neither was the case here. And Congress recognized that even this step was subject to constitutional limitations. 42 U.S.C. § 2000e-2(n)(2)(D).

and Oldsmobile officials who were at that time responsible for the overall fuel system design of GM vehicles. Pet. App. 6a. The Ivey memorandum analyzed the potential expense of the loss of human life per vehicle due to fuel-fed engine fires. The document stated that "[e]ach fatality has a value of $200,000." Tr. 415. It concluded that the cost to society of deaths and injuries from such fires was only about $2.40 per vehicle. Tr. 415-16; Pet. App. 6a. According to Elwell, the memorandum addressed

> what we were able to spend in our opinion to eliminate those fires . . . . [T]he Value Analysis says all we have got is $2.[40] to play with, if you will. We can either put that money in a fuel tank, put that money in a fuel pump, put that money in a fuel line, but in our opinion in order to save these people from dying we can put only $2.[40] into the new cars.

Tr. 418-19. Elwell's testimony was central in showing that top GM and Oldsmobile officials had received the Ivey memorandum and thus in supporting the Bakers' argument that GM had instituted a callous decisionmaking process that substantially undervalued the importance of instituting fire safety improvements.

In any event, the distinction between fact and expert witnesses cannot be of constitutional dimension, nor can it change the due process and full faith and credit analysis in this case. For example, if a defendant obtained from court A an injunction prohibiting a certain witness from testifying as an expert against it on the ground that the person was not qualified, surely that order could not be applied to prevent subsequent plaintiffs (unrepresented in the first action) from relitigating the issue of that person's qualifications as an expert.

Nor can any line be drawn according to the subjective impression of how important a particular witness' testimony might be to a party's case. Such an approach ignores the typical reality of litigation that *every* piece of evidence potentially plays some irreplaceable role in building a plaintiff's or a defendant's case.[11] It is also utterly

[11] *E.g., United States v. Mendoza-Salgado*, 964 F.2d 993, 1007 (10th Cir. 1992) ("'all the evidence was mosaic, each making its contribution, and all building up to a compelling whole that . . . the jury should actually view'") (quoting *United States v. Masiello*, 235 F.2d 279, 283 (2d Cir.), *cert. denied*, 352 U.S. 882 (1956)); *United States v. Marks*, 816 F.2d 1207, 1212 (7th Cir. 1987) ("the probative value

unadministrable and would turn GM's fear of "micromanag[ing]" litigation (GM Br. 38) into reality by requiring courts to decide just how seriously the exclusion of otherwise admissible evidence would damage a plaintiff's case. Thus, PLAC's acknowledgment that the proper disposition of this case would change if Elwell's testimony were "profound" or "central to petitioners' claim" (PLAC Br. 18 n.14, 22) is telling: not only does Elwell's testimony fall precisely into those categories — as petitioners' willingness to pursue its exclusion all the way to this Court attests — but there is no tenable constitutional theory to support the ad hoc and unprincipled distinctions that GM and its amici attempt to draw.

Nor is there any merit to GM's suggestion that a judgment to which a litigant was not a party may be applied to bar the litigant from presenting certain evidence, defenses, or issues, so long as the judgment is not invoked to eliminate the cause of action altogether. GM Br. 35. Indeed, even in *Martin v. Wilks*, the district court's initial determination that the legality of the consent decrees had been determined in a prior action did not extinguish the plaintiffs' causes of actions *altogether* — there remained for trial, for example, the issue of whether the challenged promotions were indeed required by the decrees. 490 U.S. at 760. But this Court held that the prior adjudication regarding the lawfulness of the decrees could not prevent the new plaintiffs from re-examining *that* issue. So too, *Hansberry v. Lee* involved the binding effect of a single stipulation in a prior proceeding — not the abolition of an entire cause of action. Similarly, in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969), this Court held that a single stipulation entered into by one party could not be applied against another. And in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971), this Court held that due process protected the right of each litigant to present evidence and arguments regarding the issue of a patent's *validity*, and that it was not enough merely to permit litigation over *other* aspects of a patent infringement claim. *Id.* at 329 ("Some litigants — those who never appeared in a prior action — may not be collaterally estopped without litigating the issue. . . . Due process prohibits estopping them despite one or more existing

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of evidence often depends on its being part of a mosaic").

adjudications of the identical issue which stand squarely against their position."). *See also* n.5, *supra*.

3. GM and its amici propose other procedural means by which litigants like the Bakers supposedly can avoid the harsh effects of the Michigan judgment. The tenor of these proposals is illustrated by the absurd suggestion that individuals like the petitioners — anticipating that they or their loved ones might some day be injured or killed in a GM vehicle — should have intervened in the Michigan proceeding involving Elwell. PLAC Br. 16 (otherwise, they "must live with the consequences") (*sic*). Such a view makes the settlement that was rejected in *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231 (1997), seem modest by comparison. The general rule, of course, is that — even when no time-travel would be required — "[t]he law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger." *Richards v. Jefferson County*, 116 S. Ct. 1761, 1766 n.5 (1996) (citing *Chase Nat. Bank v. Norwalk*, 291 U.S. 431, 441 (1934)); *see also Martin v. Wilks*, 490 U.S. at 763-64.

The related argument that the due process problem can be resolved on the ground that the Bakers are *now* free to seek a modification of the decree from the rendering court in Michigan is both incorrect and deeply cynical. Either the Michigan judgment is entitled to full faith and credit in the federal court proceeding in Missouri, or it is not. If it is not, then it may be ignored. *Martin*, 490 U.S. at 763 ("'Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights.'") (quoting *Chase National Bank*, 291 U.S. at 441); *Firefighters v. Cleveland*, 478 U.S. 501, 529 (1986) ("[P]arties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and a fortiori may not impose duties or obligations on a third party, without that party's agreement."). The suggestion that the Bakers, as Missouri residents, are nonetheless obliged to seek modification of the order in a Michigan state court is just another way of arguing that they *are* governed by the Michigan judgment under § 1738. It begs the question before this Court.

It is no answer to say that the Michigan court *might* modify its judgment if requested to do so by the Bakers; a nonparty may always beseech a court to reconsider a prior decision, yet that cannot justify binding the nonparty to that decision. There is nothing in federal law

that requires a state court even to *listen* to a stranger in these circumstances, and if it is willing to do so as a matter of "discretion" (NAM Br. 27), that may be solely to have the satisfaction of turning down the request. That is exactly what the Michigan court has already done on several occasions, as GM is at pains to show. GM Br. 7.[12]

The issue here is not third-party access to sealed records of the Michigan proceeding (if indeed any exist). GM Br. 40-41; NAM Br. 18-20. The information that the Bakers seek from Elwell is not knowledge that Elwell gained as a result of the Michigan proceeding, nor is it evidence uniquely within control of the Michigan court. In fact, the court never addressed the Ivey memorandum or any of the other topics on which Elwell testified in the *Baker* trial. Thus, although "courts routinely seal evidence" (PLAC Br. 20) and although a litigant or member of the media seeking those very materials must usually, for practical reasons, apply for relief to the court with custody of the records, that procedure never stops a litigant from obtaining the same evidence independently and introducing it in a separate lawsuit. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 37 (1984); *see also Butterworth v. Smith*, 494 U.S. 624, 636-37 (1990) (Scalia, J., concurring). A court sealing evidence does not purport to issue a decree binding nonparties in separate litigation to a decision that a particular evidentiary submission is inadmissible nationwide.

4. GM pretends that the injunction is justified because it is impossible for Elwell to testify without revealing privileged or confidential information. No court — in Michigan or elsewhere — has ever made such a finding — and, if such a finding had been made, it would not be binding on the Bakers. In fact, when GM sought a litigated judgment restraining Elwell from testifying, the court *denied* it. *See* p. 15, *infra*. GM points to a stipulation in which Elwell agreed

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[12] *Mathews v. Eldridge*, 424 U.S. 319 (1976) (NAM Br. 26-27), is wholly inapposite here. This case does not involve comparing two different ways of adjudicating on its merits the Bakers' right to adduce evidence. Rather, it involves replacing an adjudication on the merits by a federal court in Missouri with, at best, a chance to seek a discretionary dispensation from a Michigan court that has already entered a judgment adverse to the Bakers' contention in a proceeding in which they played no part whatever.

that, "*depending on the subject matter*," it is "extremely difficult" for him — a non-lawyer — to determine whether certain information is legally privileged. JA 30 (emphasis added).[13] GM's lawyers suffer from no such disability. In fact, Elwell *has already* testified in the first trial in this case, and *GM did not raise a single objection relating to attorney work product or attorney-client or trade secrets privileges*. Nothing about the Ivey memorandum, for example, is remotely privileged. In many other trials as well, Elwell has testified at length while typically drawing few objections from GM (and even fewer sustained objections) on grounds of privilege. Pet. App. 33a. In *Moseley v. General Motors Corp.*, No. 90V-6276 (Fulton Cty. Ga.), Elwell testified for two days (370 transcript pages) before GM made its first objection on grounds of privilege. All told, it made three such objections in 580 transcript pages. GM's current claim of privilege (GM Br. 4, citing JA 23-28) centers on documents that Elwell supposedly took when he left GM — a claim which has nothing do to with whether Elwell can provide nonprivileged *oral testimony* in this case.

More fundamentally, the privilege issue is irrelevant to the question presented. The Bakers are, and always have been, willing to litigate any issues of privilege or confidentiality that GM may wish to raise. The question here is whether the application of § 1738 can *preclude* them from doing so. The answer should be no.

5. GM argues that the Bakers can be bound by the consent judgment as persons "acting in concert" with Elwell. GM Br. 48. There is no evidence in the record to support this charge, and GM surely would have adduced it below if it had been available. In fact, the injunction was narrowed to exclude persons acting in concert. While the initial litigated injunction referred to agents, attorneys, and those "in active concert or in participation" with Elwell, JA 9, the parties agreed to delete the reference to such persons in the consent judgment. JA 30-31.

In any event, there is no contempt for the Bakers to "abet." GM

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[13] The fact that the original source of information might have been an attorney or an attorney's work product does not mean that the information itself is privileged. *See, e.g., Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981) ("The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney.").

agreed that, if Elwell testified pursuant to a court order (as here), then he could *not* be held in violation of either the judgment or the settlement agreement between Elwell and GM. Pet. App. 15a n.11. Tellingly, despite its gratuitous attacks on Elwell in its brief, GM has never moved the Michigan court to hold Elwell in contempt — much less to punish the Bakers or any of the other plaintiffs in whose cases Elwell has testified.

Moreover, the issue of contempt has no bearing on the question presented. Even if the Michigan state court could have held the Bakers in contempt, the federal district court in Missouri or the Eighth Circuit would have had no business doing so. "It is well settled that no court can punish a contempt of another court, and that the court whose order or authority is defied alone has power to punish it, or entertain proceedings to that end." *Typothetae of New York v. Typographical Union No. 6*, 138 App. Div. 293, 294 (N.Y. 1st Dept. 1910); *see also Ex parte Bradley*, 74 U.S. (7 Wall.) 364, 372 (1868); 17 Am. Jur.2d *Contempt* § 41 (1996). GM's plea for a remand to develop the "facts" in this regard is thus wholly unwarranted.[14]

II. EVEN IF FULL FAITH AND CREDIT WERE TRIGGERED, IT WOULD YIELD HERE TO OTHER, OVERRIDING PRINCIPLES

Even if there were occasions on which nonparties could be bound under § 1738, this case is not one of them. Our argument here focuses not on the sweeping assertions attributed to us by GM and its amici — assertions we have never made — such as the proposition that injunctive decrees are never entitled to full faith and credit. What we *do* argue, and what GM largely ignores, is that the application of the Michigan judgment to control the Missouri federal proceeding would turn the full faith and credit obligation into a sword, not a

[14] GM's plea is also untimely. The argument was not raised below, even though the question of whether nonparties could be bound by the Michigan judgment was squarely before both the district court and the court of appeals. The petition in this case stated, and this Court's review must proceed on the assumption, that petitioners "were not parties to the state proceeding or in privity with any party." Pet. for Cert. i. Any claim that the Bakers were "in active concert or participation" with Elwell (GM Br. 48) should have been raised in the Brief in Opposition. *See* S. Ct. Rule 15.2.

shield, by affirmatively interfering with the Bakers' access to federal court and with the institutional and systemic interests in the integrity of the federal proceeding. The full faith and credit obligation has never been thought to empower one court to control litigation in another by compelling the second court (i) *not* to permit witness X to testify, or (ii) *to* permit witness Y to testify, or (iii) to require witness Z to testify in a particular manner.

GM insists that state courts can be trusted not to enter injunctions that would entail such disastrous effects. GM Br. 30. Yet that cannot justify according full faith and credit to such orders if and when they *are* issued. And the consent decree rubber-stamped by the state judge in this very case disproves GM's assurance that abuses will not occur. The two-day "full adversarial hearing" to which GM refers (GM Br. 4) resulted in the explicit *denial* of GM's request to enjoin Elwell from testifying against GM. JA 10. The first Michigan judge made no finding that Elwell had violated any privilege of, or obligation to, GM. *Id.* Instead, she *refused* to prevent Elwell from testifying in the *Moseley* trial. *Id.* The injunction at issue (JA 29-31; Pet. App. 19a-21a) was entered as a consent decree *nine months later* by a *different* judge who held no adversarial hearing, made no findings, and simply rubber-stamped an agreed order supplied by GM. The district court in this case concluded that "GM bought Elwell's silence." Pet. App. 26a. There is no need to sketch a parade of horribles here; this case is itself the evil to be averted.

1. Once our argument is understood, much of the response to it vanishes. The values that § 1738 is supposed to serve — such as the "prestige and dignity behind a judgment" and the "institutional reputation" of the court (PLAC Br. 5, 6) — would be severely undermined if, in hearing the *Baker v. GM* case, the federal court were forced to render a decision without the benefit of probative, nonprivileged information, in violation of the historic right to "everyman's evidence." The court would risk becoming an instrument of injustice. That risk is the impetus for our reliance on Restatement (Second) of Conflict of Laws § 103 (1971) (recognizing limited exception for judgments "involv[ing] an improper interference with important interests of the sister State"), and on the warning that the Full Faith and Credit Clause was meant to prevent "parochial entrenchment on the interests of other States." *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980) (plurality opinion). Even

PLAC acknowledges that full faith and credit may not require enforcement of a decree that constitutes an "'onerous'" imposition on the forum in which its enforcement is sought. PLAC Br. 11 n.7 (quoting Restatement (Second) § 102, comment c).

2. The question here is not simply "recognition" of the Michigan injunction — for example, in the claim preclusion sense of not allowing GM to sue again for greater relief, or in the collateral estoppel sense of issue preclusion as between the parties or in favor of a nonparty. Rather, the question involves the *enforcement* of the decree — the granting of "affirmative relief" (Restatement (Second), at 302) — by the federal court.[15] That question is an open one in this Court.[16] Although GM and its amici take the broad view that all injunctive decrees are entitled to full faith and credit, the authorities on which they rely do not go so far. The leading commentator's view is that "[t]he analysis of the case law must distinguish . . . among the various types of decrees." Albert A. Ehrenzweig, CONFLICT OF LAWS § 51, at 182 (rev. ed. 1962).[17]

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[15] The enforcement of a decree against a nonparty to exclude admissible and nonprivileged evidence is hardly an action that is "easily and regularly taken" (PLAC Br. 11) by federal courts.

[16] Because this case involves the enforcement, and not merely the recognition, of the Michigan injunction, *Lynde v. Lynde*, 181 U.S. 183, 187 (1901), is squarely applicable. *See also Bray v. General Motors Corp.*, No. 93-C-265, slip op. 5 (D. Colo. Jan. 20, 1995) ("Permanent injunctions entered in a sister state offer more potential for interference with the forum state's interests as a sovereign entity than do monetary judgments. Indeed, the permanent injunction at issue in this case affects the sovereign interests of Colorado in much the same way as would the application of a sister state's law."); *Meenach v. General Motors Corp.*, 891 S.W.2d 398, 402 (Ky. 1996) ("neither the Full Faith and Credit Clause nor rules of comity require compulsory recognition of an injunction issued in another jurisdiction"). Lower-court authorities cited by GM and its amici concerning interpretation of state law (rather than § 1738) are inapposite. PLAC Br. 7 (citing *Marie Callender Pie Shops, Inc. v. Bumbleberry Enters., Inc.*, 592 P.2d 1050, 1052 (Or. App. 1979); *LaVerne v. Jackman*, 228 N.E.2d 249, 253 (Ill. App. 1967)).

[17] Professor Ehrenzweig explains that several "types of equity decrees have continued to present problems," including "[d]ecrees ordering an extrastate act or forbearance." CONFLICT OF LAWS § 51, at 182-90; *see also* Eugene F. Scoles & Peter Hay, CONFLICT OF LAWS § 24.9, at 964, 965 & n.5 (2d ed. 1992) (enforceability of equity decrees besides those for divorce or payment of money damages "generally has been a matter of some uncertainty" because "the act or forbearance ordered by the decree may itself violate local prohibitions or public policy in a way that a decree for money does not" and decree may "operate impermissibly in the second forum itself").

The reasons for not enforcing this decree involve the federal interest in the institutional integrity of federal judicial proceedings and the right of access to a federal court and to the established adjudicatory procedures of that court. The zeal with which these related federal interests have been protected is evident in a wide range of cases: *Donovan v. Dallas*, 377 U.S. 408, 412-13 (1964) (cited in our Opening Br. 27-28); *General Atomic Co. v. Felter*, 434 U.S. 12, 16-17 (1977) (*per curiam*), which made clear that even prospective federal court litigation cannot be enjoined by state courts, for reasons deducible from the statutory grant of federal judicial jurisdiction; *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525 (1958), which protected the federal interest in having disputed factual issues decided by a jury, even where it was not required by the Seventh Amendment; *Hale v. Bimco Trading, Inc.*, 306 U.S. 375, 377-78 (1939), which held that a successful mandamus proceeding in a state court against state officials to enforce a challenged statute may not be applied to bar relief in a United States district court against enforcement of the statute by state officials at the suit of strangers to the state court proceedings; and *Railway Co. v. Whitton's Administrator*, 80 U.S. (13 Wall.) 270, 286 (1871), which held that a state statute limiting wrongful death actions to state courts could not bar a suit in federal court.[18] The principle of non-interference is also manifested in the pattern of decisions in the lower courts declining to give full faith and credit to antisuit injunctions. PLAC Br. 27.

The establishment of federal courts under Article III, the legislative grant of jurisdiction pursuant to that Article, and the promulgation of a code of rules for litigation of claims in the federal courts, furnish a strong basis, rooted in federal constitutional and statutory law, for not binding a stranger to a state injunctive decree in a manner that significantly impairs federal litigation rights.

GM attempts to distinguish *Donovan v. Dallas* and related

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[18] None of these cases directly raised a question of full faith and credit, but they all furnish support for the proposition that a state court injunction significantly impairing a nonparty's federal court litigation rights should not be accorded full faith and credit.

authorities by arguing that the Michigan decree is less intrusive than an antisuit injunction. GM Br. 26-27.[19] But GM's assertion is far from self-evident. From the perspective of federal judicial integrity, it might well be worse to render a flawed judgment without the benefit of probative evidence than not to adjudicate the tort suit at all. From the Bakers' perspective, the potential loss of a punitive damages claim based on Elwell's testimony is plainly substantial. Moreover, GM has no explanation of why federal law should turn on subjective assessments of what in many cases will be matters of degree. To say that substantial interference with these litigating rights is not comparable to denial of access to a federal forum is to depend on a formal distinction without substance. The importance of protecting "[t]he federal system [a]s an independent system for administering justice to litigants who properly invoke its jurisdiction," *Byrd*, 356 U.S. at 537, extends not simply to access to a federal forum but also to the critical incidents of litigation (here, the use of available evidence to prove one's case in accord with the Federal Rules of Evidence), and to features such as the federal policy favoring jury decisions of disputed fact questions. *E.g.*, *Byrd*, 356 U.S. at 538.

Certainly nothing in the constitutional history of Art. IV, § 1 suggests that § 1738 was meant to have the radical effect GM supposes. GM Br. 14-17. The Convention rejected even the lesser step of deeming the rendering state's judgment a judgment of the enforcing state. *Williams v. North Carolina*, 325 U.S. 226, 229 (1945). Delegates warned that "there was no instance of one nation executing judgments of the Courts of another nation." 2 Max Farrand, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 448 (1911). Accordingly, Madison and Story detected only a modest change from the Articles of Confederation.[20]

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[19] The Michigan injunction *is* a form of an antisuit injunction: an application for Elwell's testimony pursuant to a subpoena in some pending proceeding (whether a legislative hearing or a tort action) is itself a "suit" and cannot cease being a "suit" by virtue of being embedded in an action for damages. *See* pp. 6-7, *supra*.

[20] Madison's brief discussion focused on the difficulties of enforcing money judgments along the borders of contiguous states. The Federalist No. 42, at 271 (Rossiter ed. 1961). Story noted that the measure was "designed to cure the defects in the existing provision" of the Articles of Confederation, which "did not invariably, and perhaps not generally, receive . . . a construction" under which "the same conclusive effects [were given] to judgments of all the states, so as to promote uniformity." Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 660, at 471-72 (1833).

3. Our argument in no way depends on the status of the injunction under Michigan law. However, GM's position is untenable for the independent reason that, under Michigan law: (i) the Elwell-GM consent decree is not to be treated as a litigated judgment and is not binding on third parties such as the Bakers, and (ii) the consent decree may be modified — as the federal district court in this case held.

a. GM and its amici contend that, under Michigan law, consent judgments are binding on third parties. GM Br. 28, 42; NAM Br. 6-9. Not so. The leading Michigan decision is *American Mut. Liability Ins. Co. v. Michigan Mut. Liability Co.*, 235 N.W.2d 769 (Mich. App. 1975), which held that "[a] consent judgment reflects primarily the agreement of the parties," that "[t]he action of the trial judge in signing a judgment based thereon is ministerial only," and that "[t]he trial judge has not determined the matters put in issue, he has merely put his stamp of approval on the parties' agreement disposing of those matters." *Id.* at 776. For this reason, a consent judgment is not accorded collateral estoppel effect in Michigan, even as between the same parties. *Id.* ("Nothing is adjudicated between two parties to a consent judgment.").[21]

A fortiori, consent judgments are not binding on third parties under Michigan law. Thus, in *Peterson v. City of Lapeer*, 307 N.W.2d 744 (Mich. App. 1981), the court held that a consent judgment between a city and certain defendants was not binding either on subsequent plaintiffs who were not parties to the prior action, "or upon the trial court." *Id.* at 748. *See also Berar*

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[21] *See also Tudryck v. Mutch*, 320 Mich. 99, 105 (1948) (cited NAM Br. 8); *In re Estate of Meredith*, 275 Mich. 278, 289 (1936) (cited NAM Br. 7); *Klawiter v. Reurink*, 492 N.W.2d 801, 802-03 (Mich. App. 1992); *Sylvania v. Berlin Twp.*, 186 Mich. App. 73, 75-76 (1990) (cited NAM Br. 8); *Van Pembrook v. Zero Mfg. Co.*, 380 N.W.2d 60, 67 (Mich. App. 1985); *Goldman v. Wexler*, 333 N.W.2d 121, 123 (Mich. App. 1983); *In re Manuel*, 76 Bankr. 105, 106-07 (E.D.Mich. 1987). *Trendell v. Solomon*, 443 N.W.2d 509 (Mich. App. 1989) (GM Br. 28), did not enforce a consent decree against a third party. Its holding — that a consent judgment could not be set aside merely on motion of one of the parties — is inapposite here. In addition, it was based on the court's survey of "authorities from other jurisdictions," *id.* at 510, not on Michigan precedent.

Enterprises, Inc. v. Harmon, 300 N.W.2d 519, 523 (Mich. App. 1980) (nonparty not subject to collateral estoppel effect of consent decree) (cited at NAM Br. 7).

b. The federal court in Missouri had "'at least as much leeway to disregard the judgment, to qualify it, or to depart from it as does the State where it was rendered.'" PLAC Br. 14 (quoting *Halvey v. Halvey*, 330 U.S. 610, 615 (1947)). "So far as the Full Faith and Credit Clause is concerned, what Florida [rendering state] could do in modifying the decree, New York [forum state] may do." *Halvey*, 330 U.S. at 614.

The district court in this case determined that the Michigan injunction should be modified because experience had shown that it was overbroad and prevented the disclosure of "much discoverable information." Pet. App. 28a. GM insists that the federal court was disabled from doing so by a Michigan procedural rule generally requiring motions for modification to be brought in the issuing court. GM Br. 42-43. That Michigan has decided to designate the issuing court as the tribunal *within Michigan* with primary — although not exclusive[22] — responsibility for overseeing a decree cannot strip courts *outside* Michigan of the corresponding power. Otherwise, Michigan would be able to negate the full faith and credit command that courts outside the rendering state have co-equal authority to modify judgments. This Court has held that local venue rules are *not* entitled to full faith and credit, *see Crider v. Zurich Ins. Co.*, 380 U.S. 39, 41-43 (1965); *Tennessee Coal, Iron & R.R. Co. v. George*, 233 U.S. 354, 359-61 (1914), and even PLAC acknowledges that rules "designed to 'keep litigation at home'" are not entitled to full faith and credit. PLAC Br. 29.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed insofar as it held that 28 U.S.C. § 1738 prevented Ronald Elwell from testifying in this case.

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[22] *See Huber v. Frankenmuth Mut. Ins. Co.*, 408 N.W.2d 505, 508 (Mich. App. 1987) (cited GM Br. 43; NAM Br. 7, 8, 28) (permitting different, non-issuing court to modify order); *Palmer v. Kleiner*, 210 N.W. 332, 333 (Mich. 1926) (permitting second judge to hear case in which first judge had already issued preliminary injunction).

Respectfully submitted.

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